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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1574

MAZHAR JALIL,

Petitioner,

—v.—

ROBERT E. HAMPTON, Chairman, United States Civil Service Commission,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes and Regulations Involved 2

Statement of the Case 4

REASONS FOR GRANTING THE WRIT

I. The decision below is in direct conflict with decisions of this Court enunciating the Constitutional rights of aliens 6

A. The Regulation 6

B. The Appropriation Act 9

II. The questions are important and the decisions are in conflict 9

III. The Constitutional questions raised are ripe for decision 10

CONCLUSION 12

APPENDIX:

Opinion of the Court of Appeals 1a

Order of the District Court 18a

Table of Authorities

PAGE

Cases:

Astrup v. Immigration and Naturalization Service, 402 U.S. 509 (1971) 8

Bolling v. Sharpe, 347 U.S. 497 (1954) 7

Dougall v. Sugarman, —— F. Supp. —— (S.D. N.Y. 1971), 40 Law Week 2304, 4 CCH Empl. Prac. Dec. §7568, *appeal filed* 40 Law Week 3485 ..... 8, 9

Graham v. Richardson, 403 U.S. 365 (1971) 6, 7, 8

Mow Sun Wong v. Hampton, 333 F. Supp. 527 (W.D. Calif. 1971) 9

Neilson v. Secretary of the Treasury, 424 F.2d 933 (D.C. Cir. 1970) 7

Purdy & Fitzpatrick v. State of California, 79 Cal. Rptr. 77, 456 P.2d 645 (1969) 7

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) 7

Teitcheid v. Leopold, —— F. Supp. ——, 4 CCH Empl. Prac. Dec. §7651 (D. Vt. 1971) 9

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 11

United States v. Carolene Products Co., 304 U.S. 144 (1938) 7

Women Strike for Peace v. Hickel, 420 F.2d 597 (D.C. Cir. 1962) 9

Younus v. Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971) .. 9

PAGE

Constitutional Provisions:

United States Constitution
Fifth Amendment 2, 7, 9

Statutes:

28 U.S.C. §1254(1) 2
28 U.S.C. §2282 10

Public Works Appropriation Act of 1970, §502, P.L. 91-144 ..... 2, 9

Executive Order 10577, Section 2.1(a) 3

Regulations:

5 C.F.R. §302.203 ..... 3, 6
5 C.F.R. §338.101 ..... 3, 6

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MAZHAR JALIL,

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—v.—

ROBERT E. HAMPTON, Chairman, United States Civil Service Commission,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on March 8, 1972, remanding the case to the United States District Court for the District of Columbia.

Opinions Below

The opinion of the United States Court of Appeals remanding the case to the District Court is unreported. It is set out in the Appendix, *infra,* p. 1a. The order of the District Court granting respondent's motion to dismiss and denying petitioner's motion for summary judgment is set out in the Appendix, *infra,* p. 18a.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia was entered on March 8, 1972. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the United States Civil Service Commission Regulations, which absolutely exclude all resident aliens from all employment in the Civil Service of the United States violate the Due Process Clause of the Fifth Amendment.

2. Whether the Appropriation Act of Congress which excludes all resident aliens from all federal employment violates the Due Process Clause of the Fifth Amendment.

Statutes and Regulations Involved

Public Works Appropriation Act 1970, §502, P.L. 91-144:

> Sec. 502. Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in continental United States unless such person (1) is a citizen of the United States (2) is a person in the service of the United States on the date of enactment of this Act, who, being eligible for citizenship, had

filed a declaration of intention to become a citizen of the United States prior to such date, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residency . . .

Executive Order 10577, Section 2.1(a):

• • • The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted or rated in examinations.

5 Code of Federal Regulations, Section 302.203:

Disqualifying factors.

The qualification standards established by an agency or by an administrative level or subdivision of any agency may provide that certain reasons disqualify an applicant

• • • • •

(g) Lack of United States citizenship.

5 Code of Federal Regulations, Section 338.101:

Citizenship.

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States.

Statement of the Case*

Petitioner is a citizen of the Republic of India. On August 8, 1969, he was admitted to the United States for permanent residence. Two days later, he applied to the Civil Service Commission to be admitted to the examination for a Civil Service rating. The application was denied on the ground that, by its regulations, the Commission may accept applications only from citizens.

On September 22, 1969, petitioner filed a class action against respondent the Chairman of the Commission seeking declaratory relief that those portions of the regulations which disqualify aliens are illegal and void and that any provisions in Congressional enactments prohibiting the use of appropriated funds for payment of salaries of alien employees of the Executive Branch are also void. In addition, he sought injunctive relief ordering the respondent to instruct the Commission and its staff that the regulations are void, that aliens must be admitted to competitive civil service examinations, and that there shall be no discrimination on the ground of alienage. In his complaint petitioner [who is an entomologist and holds the degree of Doctor of Philosophy in Biology] stated he desired to be employed in forestry, agriculture or malaria control, and did not desire to be employed in any position involving national security. He further stated that he was prepared to execute an oath of allegiance to the United States as a condition of employment.

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* The statement of the Case is taken verbatim from the opinion of the Court below, App., *infra*, pp. 2a-4a, except for the minor modifications necessary to properly identify the parties. Footnotes have been omitted.

Respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for failure to join indispensable parties. Petitioner cross-moved for summary judgment. Without opinion, the district court denied petitioner's motion for summary judgment and granted respondent's motion to dismiss.

On appeal, the United States Court of Appeals for the District of Columbia, without elaborating on the merits of petitioner's claims, reversed the decision of the District Court and remanded the case for a factual hearing to determine (1) whether the regulations and the Executive Order are illegal extensions of authority delegated by Congress to establish requirements for employment in the Executive Branch, and (2) whether the exclusion of aliens from the Executive Branch will "best promote the efficiency of that service."

Chief Judge Bazelon dissented on the ground that the proposed hearing was unnecessary and impermissible. He reasoned that the regulation and Appropriation Act were unconstitutional on their face because the government had offered no compelling interest to justify exclusion of all aliens from federal employment. He stated that it is not the District Court's responsibility to promulgate new regulations for the Civil Service Commission but only to review such regulations. Finally, as a matter of law, he would have reversed the District Court and held both the Civil Service regulation and the Public Works Appropriation Act invalid.

REASONS FOR GRANTING THE WRIT

I.

The decision below is in direct conflict with decisions of this Court enunciating the Constitutional rights of aliens.

The Civil Service Commission regulations and the Congressional appropriations act, which exclude all resident aliens from any employment in the United States Civil Service, are in direct conflict with those principles embodied in the decisions of this Court enunciating the rights of aliens.[1] Furthermore, the decision of the Court is inconsistent with recent decisions of the federal courts.

A. *The Regulation*

The Civil Service regulation which excludes all aliens from admission to competitive examination and permanent rating in the Civil Service violates the Constitutional principles announced by the court in *Graham* v. *Richardson*, 403 U.S. 365 (1971). In that case the Court held that any

[1] Those sections of the Civil Service regulations in question are 5 C.F.R. §§338.101, 302.203(g) which provide essentially that a person may be admitted to the competitive examination for appointment of the Civil Service and may receive such appointment only if he is a United States citizen.

These regulations were promulgated pursuant to the Executive Order which authorizes the Civil Service Commission to establish standards with respect to citizenship and other requirements which applicants must meet to be rated in competitive examinations for the Civil Service.

Although there is no law of Congress specifically restricting the permanent employment of aliens in the Civil Service, Congress has excluded employment of aliens in the government by regularly providing appropriation acts which prohibit payment to aliens employed in the Government.

classification based on alienage is "inherently suspect" and must be subjected to close judicial scrutiny. A compelling state interest must be shown to sustain such classification. See also, *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948); *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938) (demanding special judicial solicitude in dealing with the "discrete insular minority" of aliens). It is settled that these constitutional safeguards against invidious discrimination are applicable to the federal government by virtue of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Nielsen* v. *Secretary of the Treasury*, 424 F.2d 933 (D.C. Cir. 1970).

First, it can no longer be claimed that the "special interest" in favoring citizens over aliens in the disbursement of public funds is a compelling interest which can justify the exclusion of aliens from the federal civil service. *Graham* v. *Richardson, supra* at 374. As the California Supreme Court observed in *Purdy & Fitzpatrick* v. *State of California*, 79 Cal. Rptr. 77, 456 P.2d 645 (1969) (invalidating a California statute prohibiting the employment of aliens on public works), "[s]ince aliens support the State . . . with their tax dollars, any preference in the disbursement of public funds appears manifestly unfair." 456 P.2d at 656.

Nor can the exclusion of all aliens from all competitive positions in Civil Service be justified by the claimed necessity to employ persons of individual loyalty in sensitive positions involving national security. The government has itself conceded the absence of such a valid interest since all resident aliens are subject to the government's military draft and, if drafted, must meet even a stronger test of

loyalty. *Astrup* v. *Immigration and Naturalization Service*, 402 U.S. 509 (1971). This interest may be applicable to sensitive positions involving national security but the regulation applies to *all* positions.[2] In addition, petitioner in the instant case does not seek a sensitive position in the Civil Service.

The remand by the Court below is erroneous because the regulation excluding all aliens from all positions within the competitive Civil Service is unconstitutional both on its face and as applied to Petitioner. There can be no compelling state interest that the government can offer in a factual hearing to justify the exclusion of all aliens from all competitive Civil Service positions. Nor can the government factually justify Petitioner's exclusion on the grounds of national security, for Petitioner wishes to be an entomologist and seeks no sensitive position in Civil Service. See *Dougall* v. *Sugarman, supra,* where a three-judge district court, without a factual hearing, struck down a New York statute which excluded all aliens from the competitive class of the Civil Service on the ground that none of the interests advanced by the State were adequate justification for the classification under the standards of *Graham* v. *Richardson, supra.*[3]

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[2] In *Dougall* v. *Sugarman,* —— F. Supp. —— (S.D. N.Y. 1971), 40 Law Week 2304, 4 CCH EMPL. PRAC. DEC. §7568, *appeal filed* 40 Law Week 3485, a three-judge court held that New York State's prohibition against the employment of aliens by New York City violated the Equal Protection Clause. The court recognized the possibility that sensitive positions might properly be closed to aliens, but did not hesitate to invalidate the regulations prohibiting all aliens from employment.

[3] The Court below also erred when it remanded for a factual hearing to determine exactly which jobs would be closed to aliens for security reasons. In his dissent, Chief Judge Bazelon properly

B. *The Appropriation Act*

The Public Works Appropriation Act of 1970 §502, P.L. 91-144, which prohibits the use of appropriated funds to pay aliens employed in the federal Civil Service, enforces the same total exclusion of aliens from all positions in the federal government. The enactment simply excludes all aliens from all positions. It neither sets standards, nor reflects any compelling interests and therefore violates the Due Process Clause of the Fifth Amendment for the same reasons as do the Civil Service regulations.

II.

The questions are important and the decisions are in conflict.

Certiorari should be granted to clarify the present conflict among the lower federal courts concerning the rights of aliens to public employment. In at least three cases, federal courts have invalidated state statutes which excluded all aliens from Civil Service eligibility. *Dougall* v. *Sugarman,* —— F. Supp. ——, 40 Law Week 2304, 4 CCH EMPL. PRAC. DEC. §7568 (S.D. N.Y. 1971, 3 judge-court), *appeal filed* 46 U.S. Law Week 3485; *Teitcheid* v. *Leopold,* —— F. Supp. ——, 4 CCH EMPL. PRAC. DEC. Section 7651 (D. Vt. 1971); and *Younus* v. *Shabat,* 336 F. Supp. 1137 (N.D. Ill. 1971). But in two other cases, *Mow Sun Wong* v. *Hampton,* 333 F. Supp. 527 (W.D. Calif. 1971), and the case at bar, courts have failed to invalidate the federal

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asserted that it is not a district court function to redraft the Civil Service Regulations to make them comply with the Constitution. See, *Women Strike for Peace* v. *Hickel,* 420 F.2d 597 (D.C. Cir. 1962).

civil service regulation which discriminates against petitioner and all resident aliens.

There are approximately three million federal jobs now closed to aliens.[4] A decision extending the rights of aliens to be employed in the federal government would open those jobs to aliens and would have far-reaching effect upon the hiring practices of every state, county and municipal government.

III.

The Constitutional questions raised are ripe for decision.

The majority opinion below tangentially raised the question whether a statutory three-judge court should have been convened under 28 U.S.C. Section 2282, since it is the only court with the jurisdiction to enjoin the enforcement of the Appropriation Act (App. *infra*, p. 9a fn. 12). However petitioner has only "sought a declaration that Congressional enactments prohibiting the payment of his salary if he were to be able to achieve his goal of Government employment are unconstitutional" (App. *infra*, p. 9a fn. 12). But a three-judge court may not be convened to grant declaratory relief, 28 U.S.C. Section 2282. The petitioner will be able to obtain significant relief without an injunction enjoining the enforcement of Appropriation Act:

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[4] The Federal government is by far the largest employer in this country. It offers all types of non-security jobs including clerical, scientific and professional jobs.

According to the United States Civil Service Commission Statistics Section in June 1969, federal employment stood at 2,832,100 of whom all but approximately 100,000 were employed by the Executive Branch.

> because [Petitioner] could be appointed promptly upon his becoming a citizen if he is already on the Civil Service register. On the other hand, if he has to wait before taking the examination until he has become a citizen, the factor of delay may be crucial in his getting a position even after becoming a citizen. App., *infra* at p. 7a fn. 10.

Thus a three-judge court is not necessary to afford the petitioner the opportunity to compete and be rated in the Civil Service, and therefore both the District Court and the Court of Appeals had proper jurisdiction over the case.

Twenty-five years ago, Mr. Justice Reed said that "[*n*]*one* would deny [the] limitations on Congressional power" to "enact a regulation that no Republican, Jew or Negro shall be appointed federal office . . ." *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947) at 100. Twenty-five years later—Congress and Civil Service still seek special exemption from what "none will deny." This Court should not countenance such an exemption.

CONCLUSION

For the reasons set forth above, the petition for *certiorari* should be granted.

Respectfully submitted,

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May 1972

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,640

MAZHAR JALIL,

Appellant,

—v.—

ROBERT E. HAMPTON, Chairman
United States Civil Service Commission.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Decided March 8, 1972

Mr. Robert Allen Sedler, with whom *Messrs. Melvin L. Wulf, Lawrence Speiser* and *Ralph J. Temple* were on the brief, for appellant.

Mr. Bruno A. Ristau, Attorney, Department of Justice, with whom *Messrs. Thomas A. Flannery,* United States Attorney at the time the brief was filed, and *Alan S. Rosenthal,* Attorney, Department of Justice, were on the brief, for appellee.

Before BAZELON, *Chief Judge,* LEVENTHAL, *Circuit Judge,* and ADAMS,* *Circuit Judge,* U.S. Court of Appeals for the Third Circuit.

* Sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

Opinion for the Court filed by ADAMS, *Circuit Judge.*

Dissenting opinion filed by BAZELON, *Chief Judge,* at p. 13.

ADAMS, *Circuit Judge*: This case presents the questions whether the Civil Service Commission, consistent with the Fifth Amendment, may deny to a resident alien the opportunity to take the competitive examination for federal civil service employment, and whether appropriation acts may prohibit the use of appropriated funds to pay aliens employed in the civil service of the United States.

Appellant, Dr. Jalil, is a citizen of the Republic of India. On August 8, 1969, he was admitted to the United States for permanent residence. Two days later, he applied to the Civil Service Commission to be admitted to the examination for a Civil Service rating. The application was denied on the ground that, by its regulations, the Commission may accept applications only from citizens.

On September 22, 1969, Dr. Jalil filed a class action against the Chairman of the Commission[1] seeking declaratory relief that those portions of the regulations[2] which disqualify aliens are illegal and void and that any provisions in Congressional enactments[3] prohibiting the

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[1] Initially, we note that the Government has opened its argument by raising the "political question" doctrine as enunciated in Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1951). However, in view of the analysis of that doctrine in Baker v. Carr, 369 U.S. 186, 211 (1962), it does not appear that this matter is so purely "political" as to preclude a judicial determination of the rights of the parties.

[2] 5 C.F.R. §§ 338.101, 302.203(g) (1971).
These regulations do not forever bar Dr. Jalil from Civil Service employment. Should Dr. Jalil become a citizen of the United States, he would be eligible for appointment on the same terms as all other citizens.

[3] *See e.g.,* Public Works Appropriations Act of 1970, Pub. L. 91-144, § 502, 83 Stat. 336-7.

use of appropriated funds for payment of salaries of alien employees of the Executive Branch are also void. In addition, he sought injunctive relief ordering the Chairman to instruct the Commission and its staff that the regulations are void, that aliens must be admitted to competitive civil service examinations, and that there shall be no discrimination on the ground of alienage. In his complaint, Dr. Jalil stated he desired to be employed in forestry, agriculture or malaria control,[4] and did not desire to be employed in any position involving national security. He further stated that he was prepared to execute an oath of allegiance to the United States as a condition of employment.[5]

The Government moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for failure to join indispensable parties.[6] Dr. Jalil

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[4] Dr. Jalil is an entomologist, and holds the degree of Doctor of Philosophy in Biology. At the time this suit was filed, he was employed as a research associate at the University of Kentucky, and is currently employed by the Department of Public Health of the State of Ohio.

[5] The Government has argued that Dr. Jalil's willingness to take an oath of allegiance is a meaningless gesture because the United States is unwilling to accept such an oath as a substitute for the requirement that applicants and appointees be citizens. In view of the constitutional standards which may be applicable, however, it might be fruitful to consider whether regulations might not provide for the taking of an oath, and whether regulations which exclude only those resident aliens who refuse to take such an oath are enforceable.

[6] A question has been raised as to the failure to join indispensable parties. Insofar as the case involves Civil Service Regulations beyond the power of the chairman to change, acting by himself, there may be a requirement for joinder of the other members of the Commission. *See* Adamietz v. Smith, 273 F.2d 385 (3d Cir. 1960); Davis v. Tennessee Valley Authority, 214 F. Supp. 229 (N.D. Ala. 1962), *aff'd* 313 F.2d 959 (5th Cir. 1963); Wallace v. Seinrow, 2060 F. Supp. 270 (N.D. Ill. 1962). However, Fed. R. Civil P. Rule 21 permits parties to be "added by order of the court

cross-moved for summary judgment. The district court denied Dr. Jalil's motion for summary judgment and granted the Government's motion to dismiss.[7] This appeal followed.

Preliminarily, it should be noted that this is not a case involving the discharge of an employee already appointed to a federal position. In such a case, it has been held that the due process clause of the Fifth Amendment circumscribes arbitrary dismissals. Norton v. Macy, 135 U.S. App. D.C., 214, 417 F.2d 1161 (1969). Nor does this action involve the exercise of control over a federal employee. In such situations the power of the President may not be absolute. *See* Kendall v. United States *ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 610-613 (1838). Rather, this case presents an attack on one facet of the power of the President to appoint federal employees.

The Constitution provides that the President "shall nominate and by and with the advice of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law, but the Congress may by law vest the Appointment of such inferior officers, as they think proper, in the President

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on motion of any party or of its own initiative at any stage of the action • • •". Insofar as the complaint attacks a Congressional enactment on its face, the Department of Justice or the Attorney General should have been named as a party defendant. It appears from the record, however, that both the Justice Department and United States Attorney defended this action in the court below. On remand, the district court will be able to cure these deficiencies.

[7] In a similar case, the Government's motion to dismiss was granted by the District Court for the Northern District of California. *See* Mow Sun Wong v. Hampton (No. C-70 2730 RFP, filed August 31, 1971).

alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. Art. II, § 2, cl. 2. Federal courts "have no general supervising power" over the appointment of federal officials, and have been reluctant to impose restrictions upon the power of the President in this area. *See* Keim v. United States, 177 U.S. 290, 293 (1900).[8]

It is well settled by custom as well as by law that Congress may limit and has for many years limited the presidential power of appointment by specifying qualifications for the positions it has created. The civil service laws constitute one such restriction, and it is now generally accepted that these laws raise no constitutional questions.

We recognize that Dr. Jalil's complaint and argument raise a substantial issue as to the limits of the President's authority over the appointment of employees of the Executive Branch of the Government. However, because of

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[8] The Government contends that there is no "constitutional" protection to government employment except insofar as judicially enforceable rights may have been created by statute, citing, *e.g.*, Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 F.2d 46 (1950), *aff'd by an equally divided court*, 341 U.S. 918 (1950). But the continued vitality of such view is at the very least, in doubt, because courts have subsequently held that government employees discharged for various reasons but who desired to retain government employment could be protected on the basis that the termination or threatened termination of their employment violates their constitutional liberties. *See, e.g.*, Meehan v. Macy, 138 U.S. App. D.C. 41, 425 F.2d 412 (en banc, 1969); Norton v. Macy, *supra; cf.* United States v. Robel, 389 U.S. 258 (1967); National Ass'n of Government Employees v. White, 135 U.S. App. D.C. 290, 418 F.2d 1126 (1969). Furthermore, the Supreme Court has indicated that there may be constitutional limits on the appointment power. *See e.g.*, United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947) (dictum). *See also*, cases invalidating various statutory requirements obligating persons becoming government employees to take certain oaths, *e.g.*, Haskett v. Washington, 294 F. Supp. 912 (D.D.C., 3-judge court, 1968). Of course neither *Bailey* nor any of the other cases cited involve the issue of discrimination on the basis of alienage.

the view we take of this case, it is not necessary for us to decide that question at this time.

The Civil Service Commission operates pursuant to an authorizing statute and to an Executive Order. The statute provides in part:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section. 5 U.S.C. § 3301 (Supp. VI 1970).

In accordance with that statute, the President has promulgated the following Executive Order:

> • • • The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience,. suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted or rated in examinations. Executive Order 10577, § 2.1(a), 10 Fed. Reg. 7521 (November 22, 1954).

On the basis of this authority, the Commission has issued regulations providing:

> (a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. 5 C.F.R. § 338.101 (1971).[9]

If the quoted regulation of the Commission exceeds the authority given it by the Executive Order, then it is invalid and may not be applied to exclude Dr. Jalil from the examination. Similarly, if the Executive Order exceeds its Congressional authorization, then it is inapplicable to the extent it is not in conformity with the Civil Service Act. *See* Cole v. Young, 351 U.S. 536 (1956). A decision that either the regulation or the order is beyond the authority of its issuer obviates the need to reach the constitutional question raised in this case[10] as to the regulations or Executive Order.

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[9] According to the Civil Service Commission, the phrase "owes permanent allegiance to the United States" has been interpreted to be applicable only to natives of American Samoa, and because it is not in issue here, we need not either indorse or overrule this interpretation. We do note, however, that if the interpretation of the phrase were broadened, the regulations would be accordingly narrowed.

[10] If Dr. Jalil prevails in establishing that the Civil Service Commission Regulations exceed the authority provided by the Executive Order or by 5 U.S.C. § 3301, the court will then have to consider his allegations that the challenged provisions of the appropriations measures are unconstitutional. But it can give effective relief even before it comes to decide that constitutional question by providing for Dr. Jalil's examination and eligibility for appointment on Civil Service Registers. This relief would have significance even assuming arguendo that the appropriations measure is valid because Dr. Jalil could be appointed promptly upon his becoming a citizen if he is already on the Civil Service register. On the other hand, if he has to wait before taking the examination until he has become a citizen, the factor of delay may be crucial in his getting a position even after becoming a citizen. Furthermore, the inquiry of the court into the constitutionality of the appropriations measure may be assisted by the analysis undertaken in order to decide the validity of the Civil Service Regulation.

We have no occasion to decide at this juncture whether there may be a jurisdictional objection that precludes consideration of

These matters were asserted by Dr. Jalil in paragraph 9 of the "Cause of Action" section and paragraphs 2 and 3 of the "Relief" section of his complaint, but because the district court dismissed the complaint without opinion, we are unable to determine to what extent that court considered these non-constitutional issues.

The ultimate determinations whether either the President or the Commission acted without authority are, of course, mixed questions of law and fact which are inappropriate for decision on this sparse record. No findings of fact are included in the district court's order dismissing the complaint. In particular, there are no findings pertinent to the question whether the exclusion of aliens from the Executive Branch will "best promote the efficiency of that service."

Consequently, in the interest of the orderly administration of justice, this case will be remanded to the district court for consideration of these issues.[11] On the remand for consideration of the validity of the regulation, the dis-

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the constitutionality of the appropriations measure before Dr. Jalil or some other member of his class has passed the examination and demonstrated qualification for appointment to the Civil Service Register.

[11] *See* A Quaker Action Group v. Hickel, 139 U.S.App.D.C. 1, 3, 429 F.2d 185, 187 (1970), where this court reversed a summary disposition of a constitutional attack on Interior Department regulations, stating that the issues merited further exploration through a trial on the merits: "In this way, the issues may be clarified, substantiated, and resolved after having been subjected to the rigors of an evidentiary hearing. Nor is there any reason why this process of illuminating facts and issues should not go forward in an accelerated manner in the District Court." The court noted that the hearing would test "the reasons for the regulatory provisions and the feasibility of others that provide satisfactory safeguards" with less interference with rights having some constitutional protection.

Where the actual effect of a regulation is material, a remand—instead of a disposition that is either summary or based solely on

trict court may, of course, if it is necessary, consider the constitutional claims.[12]

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the pleadings—provides an opportunity for an airing of the questions, at least where the issues are "substantial enough to require attentive examination by [the agency] and by the District Court in the context of a presentation of pertinent evidence." Allen v. Hickel, 138 U.S.App.D.C. 31, 37, 42 F.2d 944, 950 (1970). On remand there would be opportunity for the Civil Service Commission, when called upon to support its policies, of "perhaps modifying the policies on further reflection as to the interaction of the various interests properly taken into account." Women Strike for Peace v. Hickel, —— U.S.App.D.C. ——, 420 F.2d 597, 603 (1969).

The possibility of a justification of a citizenship requirement in the regulations of the Civil Service Commission for the competitive civil service (or part thereof) is not eliminated, beyond need for attentive analysis, because the Commission's regulations do not apply to positions which have been excepted from the civil service. Whether those positions are of a "confidential or policy-determining character" (Schedule C), or not (Schedules A and B), they may be excepted only if "the Commission determines that appointments thereto through competitive examinations are not practicable." 5 C.F.R. § 6.1. In that event the responsibility for determining qualifications is vested not in the Commission but in the President or other executive officials. There is no indication, in pleadings, briefs or anything else that has come to our attention, that any such qualifications have been set so as to permit appointment of aliens. We therefore need not consider at this time the issue of possible appointment of aliens to some positions in the executive branch outside the permanent positions embraced in the merit system. This issue not only involves a separate constitutional question, as to the authority of the President to be untrammeled by statutory criteria in selecting key subordinates, but a different factual situation. Even if there is a bare possibility that the President, an elected official held to public account, may come, after the intense scrutiny within his cognizance, to vouch for the reliability and loyalty of aliens he appoints, the same considerations do not apply to those given the function of establishing criteria for the tremendous numbers in the competitive civil service. This plaintiff has not shown any interest in a position excepted from the competitive civil service and its protections. His action was expressly brought in behalf of the class of those "who desire to obtain *permanent* appointment through competitive examination in the Civil Service" (Complaint, para. 4), (emphasis supplied).

[12] Another problem is presented by the procedural posture of this case. Although Dr. Jalil has sought a declaration that Con-

After the district court dismissed the complaint in this case, the Supreme Court announced its decision in Graham v. Richardson, 403 U.S. 365 (1971). Although that decision is not squarely controlling here because it dealt with the states' power to discriminate against aliens *vis-a-vis* the Fourteenth Amendment and the federal power over the entrance and residence of aliens, it is nonetheless quite significant. The Court, in discussing standards applicable to the states, said:

> "[C]lassifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority • • • for whom such heightened judicial solicitude is appropriate." *Id.* at 372 (footnotes and citations omitted).

The Court went on to hold that the special public-interest doctrine was not an adequate justification for the denial of welfare to aliens because the Court no longer bases constitutional decisions on the distinction between benefits which are rights and benefits which are privileges. *Id.* at 374. In short, the states were required to justify such discrimination on the ground of a compelling governmental interest. *See id.* at 376.

In Nielson v. Sec'y of Treasury, —— U.S. App. D.C. ——, 424 F.2d 833 (1970), which considered a federal regulation, this Court referred to the decisions invalidating

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gressional enactments prohibiting the payment of his salary, were he able to achieve his goal of Government employment, are unconstitutional, he has not requested injunctive relief prohibiting their enforcement. Nor has he requested the empanelling of a statutory three-judge district court which, under 28 U.S.C. § 2282 (1964), may be the only court with jurisdiction to grant the full relief which would be required, should he ultimately prevail.

state measures discriminating against aliens in the absence of special justification. *Nielson* is inapposite because of the difference in the issues actually litigated, but it teaches that there is the need for a special showing by the federal government, just as there is a requirement of special justification by the states. The federal government has interests different from those applicable to the states, but nonetheless, it must demonstrate that its interests justify the discrimination against aliens.

As to this justification, the language of Judge Lumbard, in his concurring opinion in Dougall v. Sugarman, —— F. Supp. —— (S.D.N.Y. 1971), is instructive:

> "Nothing in our decision should be construed to mean that a state may not lawfully maintain a citizenship requirement for those positions where citizenship bears some rational relationship to the special demands of the particular position."

The district court must hear testimony, and make the underlying factual determinations and rulings on the validity of the Executive Order and regulation with the justification put forward.[13] The court will be able to determine the actual impact of the ban on aliens,[14] the number of

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[13] The Government has noted that nearly every civilized country, with the exception of Ethiopia, excludes aliens from civil service employment. While it does not follow *a fortiori* from this that such discrimination is thereby valid under the United States Constitution or justified by a compelling state interest, the existence of this universal practice may be relevant to the issue of the reasonableness of the discrimination and whether appellant was denied due process of law.

[14] The impact of the regulation is of particular, although not controlling, importance. In Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), the state statute there in validated purported to deny plaintiff the right to fish in California off-shore waters, and thereby to deny to him and the members of his class

aliens who might apply for federal positions, the number and type of positions for which citizenship might be a bona fide qualification, and the possibility that the Government's proper interests may be adequately safeguarded by a lesser restriction, which identified particular positions or classes of positions for which alienage might be a disqualification,[15] *e.g.*, on grounds of sensitivity or security.

On the basis of the record which will then be developed below, this Court will be able properly to decide the important questions presented in this litigation.[16]

Accordingly, this case will be remanded to the District Court for further proceedings consistent with this opinion.

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their traditional means of livelihood. Similarly, the impact of the state statutes ruled unconstitutional in Graham v. Richardson, 403 U.S. 365 (1971), was that the plaintiffs were being deprived of the very necessities of life: food, clothing and shelter.

[15] In this regard, the district court will be in a position to determine whether all Government employment constitutes a "common occupation of the country", or whether a limited number of jobs fall within that category. It may well be that the regulation is valid with regard to posts such as those involving national security or foreign policy, but not valid as to other Government jobs such as electricians, technicians, and the like. In order for the district court to pass on such questions, and ultimately for us to review them, a full factual record will be necessary.

[16] This case has implications which may reach far beyond its own particular facts. If Dr. Jalil prevails, the hiring practices of every state, county and municipal government may ultimately be affected. In fact, cases involving similar issues have been the subject matter of recent litigation. *See e.g.*, Dougall v. Sugarman, —— F. Supp. —— (S.D.N.Y. 1971), where a three-judge district court held that the Constitution forbade New York State's prohibition against the employment of aliens by the City of New York. That decision is not squarely applicable here because the state's power over aliens is more limited than that of the federal government. However, any constitutional ruling limiting the power of the federal government to discriminate against aliens would likewise prohibit such discrimination by the states.

BAZELON, *Chief Judge, dissenting:* In my opinion, a remand to the District Court for a factual hearing in this case is not only unnecessary, but also embarks that court on the improper course of re-drafting invalid regulations on an ad hoc basis to make them comply with the Constitution. I must therefore respectfully dissent from the majority's decision.

The Civil Service regulation which excludes all aliens from admission to competitive examination[1] violates the Constitution under the principles announced by the Supreme Court in *Graham* v. *Richardson,* 403 U.S. 365 (1971). In *Graham,* the Court held that classifications based on nationality or alienage are "inherently suspect" and must be subjected to close judicial scrutiny. *Graham* at 372. Thus a compelling state interest, apart from the now discredited "special public interest" in dispensing financial benefits to citizens over aliens, must be found if such classifications are to be sustained under the Equal Protection Clause.[2] *Graham* at 376. The principles announced in *Graham* apply fully to the federal government, *Nielsen* v. *Secretary of Treasury,* —— U.S.App.D.C. ——, 424 F.2d 833 (1970), and protect an individual's opportunity for public employment as well as his interest in welfare payments, *Dougall* v. *Sugarman,* —— F.Supp. ——, (S.D.N.Y. 1971).

In *Dougall* v. *Sugarman, supra,* a three-judge panel struck down, without a factual hearing, a New York statute which excluded all aliens from the competitive class of the Civil Service, on the grounds that none of the interests which New York advanced were adequate justifi-

[1] 5 CFR § 338.101(a).

[2] It cannot be doubted that a federal law can impose impermissible discrimination, "so unjustifiable as to be a denial of due process." *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954).

cation for this classification under the standards of *Graham* v. *Richardson*. In the case before us, the federal government raises no different, or more compelling, interests. It is therefore inconceivable that the Government could establish a compelling state interest at a factual hearing to justify the exclusion of *all* aliens from *all* positions requiring the competitive Civil Service examination.

The only interest which could possibly rise to that level is the perceived necessity for employing persons of undivided loyalty in policy-making positions, or positions involving national security interests. But the weakness of this interest as a justification for the total exclusion of aliens from competitive positions becomes apparent upon examination of the entire text of the Civil Service regulations. These provide explicit exceptions for the employment of aliens.[3] Furthermore, positions in the highest branches of the Executive, and those of a "confidential or policy-determining character" constitute an "excepted service" which is exempt from the Civil Service regulations and to which it seems aliens might be appointed.[4] In view of the accessibility of these undeniably responsible positions to aliens, it is rather incongruous for the Government to maintain that there is still a compelling need to exclude them from the entire rank and file of the Civil Service because of their questionable loyalty. Accord, *Dougall* v. *Sugarman, supra,* —— F.Supp. at ——, n. 6.

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[3] In the absence of qualified citizens, 5 CFR § 338.101(b)(1), and other rare instances, 5 CFR § 338.101(b)(2).

[4] *See* 5 CFR Part 213, particularly §§ 213.3101-.3394.

Even if some Civil Service positions *might* be foreclosed to aliens because of their sensitive nature,[5] it is neither proper nor possible for a District Court to undertake to identify those particular positions whose special demands make citizenship a compelling requirement. This is precisely the task which the Civil Service should perform, or else the District Court must suffer litigation on a case-by-case basis to determine the suitability of an alien for the type of job he seeks. Once the Civil Service attempts to set standards for the admission of aliens which reflect compelling governmental interests, courts can properly review them. But until then, there is nothing to be learned on remand even remotely comparable to the factual issues this court remanded in *A Quaker Action Group* v. *Hickel,* 139 U.S.App.D.C. 1, 429 F.2d 185 (1970) and the other cases cited by the majority in note 10, *supra.*[6] A regulation which simply excludes *all* aliens from *all* competitive positions on

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[5] The possibility was noted by Judge Lumbard concurring in *Dougall* v. *Sugarman* and is quoted in the majority opinion above. The mere existence of this possibility apparently did not compel the court in *Dougall* to itself undertake the task of re-drafting the New York legislation to make it comply with the Constitution.

[6] *A Quaker Action Group* presented two important factual issues which the District Court had decided summarily—the constitutionality of a narrowly drawn prohibition on picketing in front of the White House and the question of its discriminatory enforcement. *Allen* v. *Hickel* necessitated a factual inquiry into the religious purpose and effect of including a creche in the national Pageant of Peace. 138 U.S.App.D.C. 31, 424 F. 2d 944 (1970). *Women Strike for Peace* v. *Hickel,* 137 U.S.App.D.C. 29, 420 F.2d 597 (1969) involved the denial of a permit to erect an antiwar display by the National Park Service. Remand was necessary since the very policies of the Park Service were unclear and thus could not be tested. In this case the Civil Service rule is perfectly clear, as are its purported justifications. I would adhere to the teaching of *Women Strike for Peace:* "It is not for this or any other court to construct guides for park use. The duty of the court is to assure our citizens that the Park Service has rules, or criteria, or guidelines." *Id.* at 603.

its face sets no standards, reflects no compelling interests, and is therefore invalid. We should not hesitate to say so.

Thus I find no merit to the majority's contention that a factual hearing must be held in the District Court in order to resolve appellant's constitutional attack on the Civil Service regulations. I detect an intimation in the majority's opinion that we should *forebear* ruling on this constitutional question, since the case can be disposed of on a non-constitutional ground—namely, that the regulations are an illegal extension of the authority delegated by Congress to establish requirements for employment in the Executive branch. The majority focuses on the issue of whether exclusion of all aliens "best promotes the efficiency of that service." 5 U.S.C. § 3301(1).

It is clear to me, however, that this issue cannot be considered without taking full account of another Congressional enactment, the Public Works Appropriation Act, 1970, § 502, P.L. 91-144, 83 Stat. 336, which specifically provides for the exclusion of aliens from the federal payroll. This statute applies the same blanket exclusion of aliens from *all* positions[7] in the federal government, and will be of crucial weight in the determination of whether the Civil Service regulations are ultra vires.

Thus, the constitutionality of the Public Works Act must be considered by the District Court in the first instance, and it raises the same constitutional question I have outlined above. *Graham* v. *Richardson* applies with equal force to require "compelling" interests to justify exclusion of aliens from the entire federal payroll, and the Government has offered none.

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[7] Not all aliens are affected, since an exception is provided for "nationals of those countries allied with the United States in its current defense effort."

Since confrontation of the constitutional question simply cannot be avoided or ignored, there is no judicial principle or practice which would have us remand the case to the District Court for an unnecessary and impermissable factual hearing.

On principles of law, I would reverse the decision below and hold both the Civil Service regulation and the Public Works Appropriation Act invalid.

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2686-69

MAZHAR JALIL,

Plaintiff,

v.

ROBERT E. HAMPTON, Chairman, United States Civil Service Commission,

Defendant.

This matter having come on regularly for hearing on July 16, 1970 upon the motion to dismiss filed on behalf of the defendant, Robert E. Hampton, chairman of the United States Civil Service Commission, and the motion for summary judgment filed on behalf of the plaintiff, Mazhar Jalil, and the court having considered the memoranda, motions and other papers filed in this action and the arguments of counsel it is, this 24th day of July, 1970;

ORDERED that the defendant's motion to dismiss is granted and plaintiff's complaint and action are dismissed; and it is further

ORDERED that the plaintiff's motion for summary judgment is denied.

JOHN I. SMITH, JR.
United States District Judge